No. 85-1090

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

WILLIAM H. HUDNUT, III, Mayor of the City of Indianapolis, Indiana, et al.,

Appellants

vs.

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al.,

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether this Ordinance making coercion, force, assault, and trafficking in pornography civilly actionable as sex discrimination violates the right to freedom of speech guaranteed by the First Amendment to the Constitution of the United States.

(2) Whether an allegation that the mere existence of a civil law creates a chilling effect on the exercise of the right to freedom of speech is sufficient to establish a "case or controversy" under Article III of the Constitution of the United States.

(3) Whether the federal courts should abstain from ruling on the constitutionality of an ordinance which has never been enforced and whose terms have never been construed by the state courts.

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WILLIAM H. HUDNUT, III, Mayor
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Appellants

vs.

AMERICAN BOOKSELLERS ASSOCIATION,
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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

William H. Hudnut, III, Mayor of the City of Indianapolis, et al.[1], Appellants, appeal from the final

[1] Pursuant to Supreme Court Rule 15.1(b), Appellants hereby list those parties whose names are not contained in the caption. In addition to William H. Hudnut, III, Mayor of the City of Indianapolis, the other appellants are the City of Indianapolis; the County of Marion; the Department of Administration of the City of Indianapolis; the Office of Equal Opportunity of the City of Indianapolis; the Equal Opportunity Advisory Board of the City of Indianapolis; Joseph McAtee, Chief of Police of the City of Indianapolis; Stephen Goldsmith, Marion County Prosecutor; and James Wells, Marion County Sheriff.

The appellees not listed in the caption consist of the Association of American Publishers, Inc.; the Council for Periodical Distributors Associations; the Freedom to Read Foundation; the International Periodical Distributors Association, Inc.; Koch News Company; National Association of College Stores, Inc.; Omega Satellite Products Co.; Video Shack, Inc.; and Kelly Bentley.

judgment of the United States Court of Appeals for the Seventh Circuit, dated August 27, 1985, and submit this jurisdictional statement to show that this Court has jurisdiction of the appeal and that the questions presented are substantial.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals, which appears in the Appendix hereto, pp. A-1 through 22, is reported at 771 F.2d 323 (1985).

The opinion of the United States District Court for the Southern District of Indiana, which appears in the Appendix hereto, pp. B-1 through 52, is reported at 598 F.Supp. 1316 (S.D. Ind. 1984).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit, declaring the definition of pornography contained in Section 16-3(q) of Chapter 16 of the Code of Indianapolis and Marion County, Indiana unconstitutional, was entered on August 27, 1985. See App., A-1. A petition for rehearing with a suggestion for rehearing en banc was entertained and denied on September 20, 1985. See App., C-1.

A notice of appeal to this Court was duly and timely filed with the United States Court of Appeals for the Seventh Circuit on October 29, 1985. See App., D-1.

This appeal is being docketed in this Court within 90 days from the date of the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2).

CONSTITUTIONAL PROVISIONS AND ORDINANCE

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech. . . .

Article III, Section 2.[1], United States Constitution:

The judicial Power shall extend to all Cases ... [and] Controversies....

Section 16-3(q) of Chapter 16 of the Code of Indianapolis and Marion County, Indiana:

Pornography shall mean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

(1) Women are presented as sexual objects who enjoy pain or humiliation; or

(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or

(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or

(4) Women are presented being penetrated by objects or animals; or

(5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual;

(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

The use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section.

Section 16-3(g) of Chapter 16 of the Code of Indianapolis and Marion County, Indiana:

Discriminatory practice shall mean...

* * *

(4) Trafficking in pornography: The production, sale, exhibition, or distribution of pornography....

(5) Coercion into pornographic performance: Coercing, intimidating or fraudulently inducing any person, including a man, child or transsexual, into performing for pornography, which injury may date from any appearance or sale of any products of such performance....

(6) Forcing pornography on a person: The forcing of pornography on any woman, man, child or transsexual in any place of employment, in education, in a home, or in any public place.

(7) Assault or physical attack due to pornography: The assault, physical attack, or injury of any woman, man, child or transsexual in a way that is directly caused by specific pornography.

(8) Defenses: Where the materials which are the subject matter of a complaint under paragraphs (4), (5), (6), or (7) of this subsection (g) are pornography, it shall not be a defense that the respondent did not know or intend that the materials were pornography or sex discrimination; provided, however, that in the cases under paragraph (g)(4) of section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of section 16-3, no damages or compensation for losses shall be recoverable unless the complainant proves that the respondent knew or had reason to know that the materials were pornography. Provided, further, that it shall be a defense to a complaint under paragraph (g)(4) of section 16-3 that the materials complained of are those covered only by paragraph (q)(6) of section 16-3.

The entire text of Chapter 16 of the Code of Indianapolis and Marion County, Indiana is reprinted at Appendix E.

STATEMENT OF THE CASE

On April 23, 1984 the Indianapolis City-County Council passed Indianapolis, Indiana, City-County General Ordinance No. 24. The Ordinance was enacted as an amendment to Chapter 16 of the Code of Indianapolis and Marion County, Indiana, which law prohibits discrimination on the basis of race, color, religion, ancestry, national origin, handicap or sex. The Ordinance identified and prohibited four discriminatory practices based on "pornography": trafficking in pornography, coercion into a pornographic performance, forcing pornography on a person and assault or physical attack due to pornography. It was signed into law by the Mayor on May 1, 1984.

On that same day American Booksellers, et al., filed its complaint against William H. Hudnut, III, et al., with the United States District Court for the Southern District of Indiana, Indianapolis Division, seeking declaratory and injunctive relief against Ordinance No. 24 on the grounds that it violated the First Amendment guarantee of freedom of speech, imposed an impermissible prior restraint and was unduly vague. On May 9, 1984, the District Court issued an uncontested order preliminarily enjoining Hudnut, et al., from enforcing the Ordinance.

On June 11, 1984 the Indianapolis City-County Council passed Ordinance No. 35 which, among other things, redefined pornography to be "the graphic sexual explicit subordination of women, whether in pictures or in words", that also included one of six specific scenarios of degradation or violence against women. Subsequently American Booksellers, et al., amended its complaint to reflect these amendments.

On June 30, 1984 the District Court heard oral arguments on the parties' cross-motions for summary judgment and took the matter under advisement. On November 19, 1984 the court entered its Judgment, Findings of Fact and Conclusions of Law declaring the Ordinances unconstitu-

tional. The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court on the grounds that the definition of pornography contained in the ordinance violated the right to freedom of speech protected under the First Amendment to the United States Constitution.

THE QUESTIONS ARE SUBSTANTIAL

At least since *Roth*, this Court has recognized that pornographic materials exist which serve none of the purposes for which speech is constitutionally protected. *Roth v. United States*, 354 U.S. 476, 485 (1957) ("the lewd and obscene...are no essential part of any exposition of ideas..." (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). The doctrine of obscenity, while not the only approach taken to this general area, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *F.C.C. v. Pacifica Fdn.*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982), has constituted the major attempt to provide a workable tool for localities to combat this problem. *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. 2794 (1985). In spite of all attempts, however, since *Miller*, pornography has grown to an over $8 billion per year industry, conservatively estimated. 1984 U.S. NEWS & WORLD REP. 84 (June 4, 1984). *See also Paris Adult Theatre I, supra*, (Brennan, J., dissenting).

Appellant has taken the lead in passing a unique ordinance that has been widely recognized as an innovative and promising new approach to the social problem of pornography. Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARVARD LAW REVIEW 460, 463 (1984); 1985 NEWSWEEK 58, 60 (March 18, 1985); "[T]his novel measure, whose supposed invalidity follows surely from no clear precedent...may eventually be found to be the most sensible approach to an area which has vexed some of the best legal minds for decades." Letter from L.

Tribe to A. Rainville (Jan. 8, 1984). The "civil rights approach" permits civil suits by victims of pornography's making and use, rather than employing criminal bans on materials found to violate moral standards. The Ordinance focuses on violent sexual materials. Empowering victims to sue would have a major impact both on this industry, about which little effective is being done, and on its social costs, which have escalated as the industry has grown.

Passing on determinations of the constitutionality of local legislation is at the core of this Court's oversight function. The erroneous opinions below are widely perceived as authoritative. If not overturned, they will continue to deter jurisdictions that want this law such as Minneapolis, Los Angeles and Cambridge, Massachusetts. But the urgency to provide relief for victims of the pornography industry guarantees that the full attention of this Court will repeatedly be sought. The substantial conflict between equality rights on the one hand and First Amendment issues on the other — while more suitably resolved in a concrete application — will continue to be pressed until resolved on its merits by this Court.

If an issue of this importance is to be nationally resolved, it should be by this Court, not by the Seventh Circuit. It should be resolved in an opinion, unlike that of the Seventh Circuit, which accurately construes the language of the Ordinance, is alive to the magnitude of the pornography problem, cognizant of the strength of the state interests, and sensitive to this Court's framework for analyzing First Amendment imperatives.

SUMMARY OF ARGUMENT

Because it explicitly refused to balance the interests at stake, the Court of Appeals gave no weight to the record of harm and ignored the equality interests urged by appellants. Bypassing accepted methodology in which legislative exceptions to the First Amendment are sometimes permitted on a showing of social harm, the Court of Appeals' broad approach would invalidate any

regulation of pornography through its harm — no matter how narrowly drawn. The Court of Appeals proceeded as if the Ordinance, to be constitutional, must either fall within a recognized exception or be content-neutral. This is not the law. Moreover, the interests sought to be furthered by this law — sex equality, including equal access to speech — are not only legitimate and substantial, they are compelling.

Seeking to invalidate the Ordinance by invalidating its definition of pornography, the Court of Appeals held *sua sponte* that the Ordinance impermissibly discriminates on the basis of viewpoint. The Ordinance does not restrict pornography on the basis of any point of view articulated or affirmed by pornographers or their consumers, but on the basis of the harms of civil inequality which are exploited and engendered through its making, marketing, and use. The record shows that the pornography industry is constructed on sex-based powerlessness and generates sex-based abuse. Achieving sex equality is a public policy, not a viewpoint; coercion, force, assault and trafficking are not viewpoints, nor is suing for these acts "thought control" (*see* Court of Appeals' opinion, App. A., A-10) since they are not mere thoughts. Powerlessness and abuse are conditions, comprised of acts, which have values intrinsic to them as most acts do. That does not make them points of view. In invalidating the Ordinance wholesale, despite an explicit severability clause, the Court of Appeals swept away potential suits by coerced former pornography models and direct victims of rape as well as citizen suits against sex-based subordination on a society-wide scale.

The Court of Appeals did not so much as mention the line of authority under which government's purpose to eliminate sex discrimination raises "compelling state interests," *Roberts v. U.S. Jaycees*, 104 S.Ct. 3244 (1984), which can outweigh First Amendment rights. Records where this is allowed show comparably less grievous and pervasive harm. They also show a less concretely demonstrated nexus between the speech interests to be curtailed and the aims of the legislation, *e.g.*,

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973) (First Amendment interest in sex-segregated job ads outweighed by deduced relation to ending sex segregation in workforce). *See also Beauharnais v. Illinois*, 343 U.S. 250 (1952). Had the interests been balanced under applicable law, pornography, *as defined, and only when* made through coercion, forced on unwilling viewers, the direct cause of assaults, or actively trafficked in communities that do not want it, furthers a governmental purpose in eradicating sex discrimination in violent and violating forms, which interest "overwhelmingly outweighs the expressive interests, if any, at stake." *New York v. Ferber*, 458 U.S. 747, 763-64 (1982).

The Court of Appeals, in its eagerness to invalidate the Ordinance on the merits, overlooked other technical defects in this litigation. Each alone counsels reversal. From their pleadings, Appellees are a group of legitimate publishers, booksellers, and one customer, not pornographers. Because they allege no actual or threatened injury caused by Appellants, their complaint amounts to no more than an alleged "chilling effect" which alone has never provided requisite injury in fact for constitutional adjudication. *Younger v. Harris*, 401 U.S. 37 (1971); *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). Appellees are attempting to secure an advisory opinion in an abstract context which would exclude real pornographers, real pornography and its victims, thereby denying this Court an essential factual context in which to adjudicate the constitutionality of this Ordinance. Whether on prudential grounds of proper adjudication, or on technical grounds of standing, there is no Article III "case or controversy" between these parties.

The lack of facts combined with the disregard of the record and distortion of the statutory language produced an opinion based on conjecture, abstract theorizing, and academic commentary to settle statutory meanings. It is to avoid such abuse of the federal judicial function that federal courts abstain from inventing applications and

meanings of complex and novel laws until they are interpreted by state courts.

Appellants therefore request plenary consideration on the grounds that hiding harm to citizens behind the First Amendment has never been the law of the First Amendment.

ARGUMENT

I. Pornography, As Defined, Is Not Protected Speech.

Each court that has reviewed the Ordinance has reaffirmed the legislative findings: "we accept the premises of this legislation." (App. A, A-11; *see also* App. B, B-21) Neither court disagreed with the legislative judgment that these harms are based on sex or questioned the conceptualization of these acts as practices of sex discrimination. The only issue has been whether this harm of sex discrimination matters under the Constitution.

The legislative record shows that the pornography industry produces verbal and visual sexual entertainment made from coercion, rape, extortion, exploitation, intimidation, fraud and unequal opportunities.[2] This material then engenders coercion, rape, extortion, exploitation, intimidation, fraud and unequal opportunities through its consumption. Pornography, as defined, and when coerced, forced on individuals, the cause of assault, or actively trafficked, is inseparable from aggression and terror, crimes, torts, and unspeakable indignities. Although men are also victimized and also covered, women and children are its primary targets and victims.

Having accepted this reality, each court ruled that stopping this injustice is not as important to the

[2] *See* Indianapolis City-County Council Legislative Record, designated Exhibits A-X to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment in the district court (hereinafter "Defendants' Brief").

Constitution as inflicting it. Both assumed that the Ordinance must fit under an existing exception or counterbalance to the First Amendment, primarily obscenity. (*See, e.g.*, App. A, A-3, A-4, A-10, A-16) Inasmuch as the Ordinance was found to be not content-neutral, the interests were not balanced (App. A, A-4) and sex discrimination was found too limited a rationale. (App. A, A-17) To assign such a low value to women's rights, without weighing them against this means of sex-specific victimization, is to legitimize sex inequality.

Because the Ordinance is based on detailed findings of harm (A), and the harm is sex discrimination (B), and the Ordinance does not discriminate on the basis of viewpoint (C), it should have been upheld.

A. **The Court of Appeals ignored accepted First Amendment methodology in cases in which challenged legislation is based on a record of harm.**

Although speech interests are always weighty, they are never absolute, nor are they at all times paramount. Presented with conflicting interests raising speech claims, this Court employs a balancing test. *New York v. Ferber, supra; Pittsburgh Press Co. v. Human Relations Comm'n, supra; Gertz v. Robert Welch*, 418 U.S. 323 (1974); *Healy v. James*, 408 U.S. 169 (1972). When fashioning new exceptions, it does not attempt to fit within pre-existing ones, *e.g., Ferber*, 458 U.S. at 761 (value of obscene materials found irrelevant to specific harm of child pornography).

Because the Court of Appeals admittedly did not weigh the interests, the record it purported to accept was effectively given a weight of zero, treating the First Amendment as if it were an absolute. Also because it did not balance, the Court of Appeals evaded the fact that the materials this Ordinance covers have about as little First Amendment value as it is possible to have and still be pictures and words. "Pornography" is "the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of" six concrete categories.

A plurality of this Court has already determined that "sexually explicit" materials are not entitled to fullest First Amendment protection. *Young v. American Mini-Theatres, supra*, (Stevens, J. for the plurality). There is "surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free determination of ideas of social and political significance...." *Id.* 427 U.S. at 61. Obscenity is constitutionally a crime without any showing of harm. *Paris Adult Theatre I, supra*. Trafficking in pornography ought to be civilly actionable *with* such a showing, especially where the materials are predominantly narrowed to the presentation of *violent and illegal* acts in a way that makes them erotic. Valuing materials for their power to do the harm that they do (App. A, A-12) is perverse and unprecedented.

After evaluating the materials the Ordinance covers, the value of which reaches a First Amendment nadir, the Court of Appeals should have *separately* balanced the interests at stake in each of the four causes of action.

1. The coercion provision: How does the Constitution balance the value to Linda Marchiano of her abduction, beatings, torture, and humiliation against the speech value of "Deep Throat," which it took these acts to make, to the pimp and the organized criminals who have marketed her rape as sexual entertainment?[3] Which is more important, what was done to her or the "speech" they made of it? In *Ferber*, faced with the conflict between the harm of the production *and dissemination* of child pornography to the child performers on the one hand, and the First Amendment speech interest in the materials on the other, the Supreme Court had no trouble holding that the materials required and constituted child abuse. 458 U.S. 747 (1982). The record of harm to *coerced* adult women, including some who are murdered to make "snuff" films,

[3] *See* Defendants' Brief, Exhibit U.

130 CONG. REC. S13192 (Oct. 3, 1984) (remarks of Sen. Spector), certainly compares with the showing that justified the elimination of the entire market in child pornography to the *Ferber* Court.

2. The assault provision: What is the speech value to the traffickers in *Violent Stories of Kinky Humiliation, Violent Stories of Dominance and Submission, Bizarre Sex Crimes, Shamed Victims*, and *Water Sports Fetish, Enemas and Golden Showers* balanced against the young woman who was abducted, cut, pierced, sodomized, urinated and defecated on and choked into unconsciousness, of which the Minnesota Supreme Court said "[i]t appears that in committing these various acts, defendant was giving life to some stories he had read in various pornographic books." *State v. Herberg*, 324 N.W. 2d 346, 347 (Minn. 1982).

3. On the force provision: What is the speech interest of a man who forces pornography on his daughter so that she will keep silent about her mother's torture, saying, "if you tell, this is what I'll do to you." MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R. - C.L.L. REV. 1, 41 (1985). The Court of Appeals invalidated this provision although it does not reach the materials themselves. Possible unforced exposure of juveniles to obscenity has long justified criminal prohibitions, *Ginsberg v. New York*, 390 U.S. 629 (1968), along with the interest of *unwilling* adult viewers in avoiding obscene works. *Miller v. California, supra*.

4. On the trafficking provision: Balance the speech value to its traffickers and consumers of "The Domination of Tammy" (which was part of the legislative record) compared with the women and children whom it targets for being hung upside down, rammed with rods, tortured, and told, as "Tammy" was in the film, "this is not rape, this is fun." Weigh the value of this film against the laboratory evidence that predicts, and the social and testimonial evidence that confirms, that the materials covered by the trafficking provision increase attitudes and behaviors of violent and non-violent discrimination, primarily by men

against women. "[T]he most important result of this research...is the finding that these changes in attitudes and arousal are directly related to agression against women." PORNOGRAPHY AND SEXUAL AGGRESSION 63 (E. Donnerstein and N. Malamuth eds. 1984).[1] Balance the interests of women and children trapped in prostitution by the blackmail of the pornography made of them against the speech interest in the existence of the market that provides the incentive and the enforcement for their enslavement.

A final harm that the appeals court neglected to balance constitutes the *First Amendment motive* for this legislation: the effort to mitigate the silence of women, the exclusion from access to speech which both measures and reinforces exclusion from full citizenship. The Ordinance is an effort to expand access to First Amendment rights by affecting the social determinants which currently preclude women from having effective access to speech. These conditions include the sexual abuse which pornography stimulates and sanctions, its erotization of that abuse such that it is experienced as pleasurable rather than violating for the victim, the definition of women as a group for whom such treatment is appropriate and enjoyable, and the social worthlessness of women which is thereby exploited and furthered.

There is an affirmative side to the First Amendment. In order "to facilitate and enlarge public discussion and participation" this Court in *Buckley v. Valeo* rejected the argument that government, in regulating public financing of elections under the First Amendment, must be wholly neutral as to political speech. 424 U.S. 1, 92-93 (1976). To facilitate access of all to public broadcast, access can be regulated. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969). Also "[w]hen expression occurs in a setting

[1] The Court of Appeals' statement that "empirical studies" conflict is false. (App. A, A-12) The legislative record expressly states that the 1970 Commission studied *other materials* and asked *other questions* with *less sophisticated methods*. *See* Defendants' Brief, Exhibit V (testimony of Donnerstein).

where the capacity to make a choice is absent, government regulation of that expression may co-exist with *and even implement* First Amendment guarantees." *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring) (emphasis added). Indianapolis found sex inequality to be such a setting.

B. **The interest in eradicating sex discrimination should have outweighed the expressive value, if any, of pornography.**

Under the First Amendment, the Ordinance presents a theory of first impression, combing speech and action, *United States v. O'Brien*, 391 U.S. 367 (1968), communicative and noncommunicative elements, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), content and content-neutral features, *Young v. American Mini Theatres, Inc., supra*, without viewpoint discrimination in an unprecedented statutory strategy. If the theory of this ordinance is to be resolved on the merits in this abstract posture, it raises novel issues which require the full attention of this Court.

The harm of pornography is the harm of sex inequality. (App. A, A-11, A-12) By accepting this harm but holding that "any rationale we could imagine in support of this ordinance could not be limited to sex discrimination," (App. A, A-17), the Court of Appeals ruled that pornography can not be legally restricted through the harm it does — because the harm it does, it does through gender. This is, so to speak, to discriminate against sex discrimination as a category of governmental interest.

If obscenity, far less concretely defined, can be constitutionally prohibited, if mere "indecent language," *F.C.C. v. Pacifica, supra*, can be constitutionally regulated, surely a "compelling state interest" of constitutional dimension such as sex equality, *Roberts v. U.S. Jaycees, supra*, stands on a comparable plane, given that even protected speech can be restricted where a compelling state interest exists. *Carey v. Brown*, 447 U.S. 455 (1980).

Eradicating gender discrimination is public policy. *Reed v. Reed*, 404 U.S. 71 (1971); *Los Angeles v. Manhart*, 435 U.S. 702 (1978). Both courts below assumed that the interest in eliminating sex discrimination can *never* outweigh a First Amendment interest. *Hishon v. King & Spaulding*, 104 S.Ct. 229 (1984), as well as *Pittsburgh Press Co. v. Pittsburgh Com'n on Human Rel.*, *supra*, and *Roberts v. U.S. Jaycees*, *supra*, are contrary and were not even mentioned. The Constitution grants no fundamental right to discriminate: "[i]nvidious private discrimination may be characterized as a form of exercising freedom . . . protected by the First Amendment, but it has never been accorded affirmative constitutional protection." *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). If it is accepted that pornography is a practice of sex discrimination, then eradicating it constitutes a compelling state interest, potentially outweighing the First Amendment.

Rather than balancing the interests, the Ordinance was catagorically found not content neutral and thus invalid *per se*. In fact, the Ordinance combines content elements much like others that have been permitted, with noncontent elements, drawing lines on the basis of the specific harm it seeks to remedy. Content neutrality is not legally required, or *Young*, *Pacifica*, or *Ferber*, not to mention *Miller*, would not have become law. "The question of whether speech is, or is not, protected by the First Amendment often depends on the content of the speech." *Young v. American Mini Theatres*, 427 U.S. 50, 66 (1976). More recently in *Brockett v. City of Spokane*, this Court held that "prurient," when meaning abnormal ("i.e., lascivious"), but not normal ("i.e. lust"), erotic interest is not permitted in materials which, inter alia, include as content "violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture." 105 S.Ct. 2794, 2796-97 (1985). In the instant case, part of the relevant determination is whether, in the face of a clear record of harm (and separately assuming coercion, force, assault, or trafficking), a

legislature may constitutionally determine that it is unacceptable to eroticize sexual abuse when citizens are thereby subordinated on the basis of their sex.

The Ordinance is not a pure content restriction. First, the *definition* is not a pure content restriction. Of course it contains content terms, such as subsections (1)-(6), but then "falsely shouting fire in a theatre and causing a panic", *Schenck v. United States*, 249 U.S. 47, 52 (1919) contains "fire" as the content of its message. Any "mental intermediation" (App. A, A-12) is similarly physical and reflexive. Pornography is no more "mental" than obscenity, and obscenity is considered "not expression" at all. *Roth v. United States*, 354 U.S. at 492 (1957).

As the Court of Appeals glimpsed intermittently (*see, e.g.*, App. A, A-8, A-10), the definition states its harm in the active voice: pornography is the graphic sexually explicit *subordination* of women. To paraphrase, pornography is that sub-set of sexually explicit materials which subordinate women through pictures or words when certain concrete features are also present. Just as "a book about slavery is not itself slavery" (App. A, A-14), to express the idea of subordination is not to subordinate. Indeed, the City-County Council amended the definition, changing it from "sexually explicit subordination of women, graphically depicted" to "graphic sexually explicit subordination" to make just such a distinction.

To state the obvious, the burden of proving that materials at issue subordinate women, as opposed to merely expressing the idea that women are or ought to be subordinate, will rest with plaintiffs in real cases. It will be a defense that the materials merely express an *idea about* the subordination of women. Although many depictions and descriptions of a woman being subordinated will be found in actual cases to subordinate women, the Ordinance on its face does not make the mere depiction or description of a woman being subordinated actionable, even if the materials contain the rest of the definitional elements. The issue on *facial* review is whether materials that *do*

subordinate women, through their making or use, are nevertheless protected by the Constitution.

Having grasped that materials to be covered must subordinate women actively, the Court of Appeals did not sustain this recognition in its doctrinal discussion. The definition was treated as a restriction on an "idea." (App. A, A-9, A-10) An idea about subordination may be "a perspective an author adopts" (App. A, A-10) but an exploited woman is a human being, not an idea, and her actual subordination does not end at its conception. The Court of Appeals appears to believe that if materials that practice the subordination of women at the same time express an idea, they become *ipso facto* protected speech. Many activities, from pure verbal acts to mute assaults, express ideas and they do not therefore become protected speech. Just because a practice embodies a concept does not mean that it is not also a practice of that concept. A "Whites Only" sign expresses the idea that blacks are inferior to whites; it is also a practice of that idea. Admittedly, the idea may suffer if its practice is precluded, but this is because the idea that women are properly men's subordinates, like the idea that blacks are properly the subordinates of whites, relies for much of its effectiveness and credibility upon its practice. Segregating a community does not become protected speech because it expresses the idea that the races belong separate any more than punching a person in the face becomes protected speech because it delivers a point.

The Court of Appeals also ignored the fact that *nonspeech* elements must be present in any action brought under the Ordinance. *The definition is not in itself actionable*, nor is this a criminal law. Coercion, force, assault and trafficking are not ideas or mental intermediations. As this Court has observed, "Appellant was not prosecuted here for anything he said or believed, *but for what he did*, for his dominant role in several enterprises engaged in producing and selling allegedly obscene books." *Mishkin v. New York*, 383 U.S. 502, 504-05 (1966). To say or believe is not to sell or

distribute. Nor is discrimination permitted because it is in business. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

The Ordinance does not preclude discussion of topics or subject matter. *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980). Speakers can continue to extol sexualized misogyny and the inevitability and joys of women's naturally second class civil status. They can argue that women's purpose on this planet is to be bought and sold for sexual use, as in pornography. Nor does the Ordinance restrict advocacy beyond *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Speakers can advocate sex inequality as the paradigm of sexual pleasure, promote subordination, urge rape, or incide sadism, subject to preexisting case law. What they may not do is practice coercion, force, assault or trafficking in localities that do not want women subjected by this means in their community.

The issue this ordinance poses is whether harm that revolves around these words and pictures, harm that can only be reached through reaching them, is placed beyond a jurisdiction's grasp because it is words and pictures it revolves around. If a medium through which harm is done is words and pictures, does it remain protected by virtue of the fact that, because it is words and pictures, it delivers much of its harm at the same time it delivers its message? In *Los Angeles v. Taxpayers for Vincent*, this Court upheld a regulation against posting signs where the adverse impact of the speech, "visual blight," is "not merely a possible by-product of the activity, but is created by the medium of expression itself." 104 S.Ct. 2118, 2132 (1984).

Pornography is inextricably interwoven with crimes such as rape, battery, sexual abuse of children, and pimping. *People v. Souiter*, 178 Cal. Rptr. 111 (Cal. Ct. App. 1981) (paying for sex to make pornography of it is pandering). Even First Amendment absolutist Justice Douglas thought that "freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded

with illegal action as to be an inseparable part of it." *Roth v. United States*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting). These acts are so inseparable from this industry that it cannot exist without them.

C. The Ordinance Does Not Discriminate On The Basis Of Viewpoint.

Raising the issue for the first time in this litigation, the Court of Appeals invalidated this Ordinance by invalidating its definition of pornography as a discrimination on the basis of viewpoint. The definition was faulted for restricting only sexually explicit materials that present a view of women and of sex that favors inequality, while permitting sex inequality to be favored through other than sexually explicit means, and permitting sexually explicit materials that favored sex equality. The Court of Appeals misconstrued the Ordinance on its face and misapplied the law on viewpoint discrimination.

The law against viewpoint discrimination derives from the intersection between the Equal Protection clause — to further the principles of which is also the aim of this law against pornography — and the First Amendment. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972). Cases on viewpoint discrimination typically treat statutes that restrict which speakers may have access to a forum, to see if the restriction is based on their angle of vision or political position. *See, e.g., Perry Education Assn. v. Perry Local Educators' Assn.*, 103 S.Ct. 948 (1983). This ordinance restricts nothing based on who the speaker is. It defines pornography on the basis of what it does, and then empowers those who are injured through it in specified ways to sue.

Only if pornography is protected speech do Appellants have to justify its restriction against a charge of discrimination on the basis of viewpoint at all. The Court of Appeals took closer to the inverse approach: because the Ordinance discriminates on the basis of viewpoint, the materials it covers are protected speech. The panel

proceeds as though this were an ordinance making actionable coercion into films that are critical of Republicans but not those critical of Democrats. (App. A, A-16) It is not that pornography presents a one-sided argument in favor of the inequality of the sexes — which it certainly does — that supports Appellants' interest in its elimination. Rather, when graphic sexually explicit materials actively subordinate on the basis of sex in one of five contexts in one of four ways, those who practice that inequality can be held accountable for it.

Materials which are not constitutionally protected because of the harm they do, do not become protected because they serve as a vehicle for a viewpoint. The law making the production and distribution of child pornography a crime does not become invalid because child pornography takes the *view* that sex between adults and children is liberating and educational for the child. Nor is the statute in *Ferber* invalid because it takes the view that child pornography is child abuse. Indeed, the *Ferber* statute is not neutral in the sense the Seventh Circuit requires here, since it covers only children, while the Ordinance under review covers adults (both sexes) as well as children. Laws against advocacy of violent overthrow of the government, *see Brandenburg v. Ohio, supra*, are not invalid discriminations on the basis of viewpoint because they do not also prohibit advocacy to preserve the government or advocacy of peaceful change. The local sex discrimination ordinance validated in *Pittsburgh Press* did not violate the First Amendment because sex-segregated ads *express the view* that the workplace should be segregated by sex, nor was the law invalid because it legislated an "approved view" (App. A, A-10) of the place of the sexes in the workforce. Laws against harms through speech are not considered permissible by virtue of their viewpoint neutrality, but because the unrestricted speech does not do the damage. Harmful acts committed through speech do not become protected as speech simply because they communicate a point of view as they inflict an injury.

> Acts of invidious discrimination . . . cause unique evils that government has a compelling interest to prevent — *wholly apart from the point of view that such conduct may transmit.* Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.

Roberts v. U.S. Jaycees, 104 S.Ct. 3244, 3255 (1984) (emphasis added).

The Ordinance is not a viewpoint discrimination for two additional reasons. First, coercion, force, assault, and trafficking are, to dignify them, "a means of promoting a viewpoint, not a viewpoint in itself." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 105 S.Ct. 3439, 3454 (1985). Second, there are no facts showing that appellants were "impermissibly movitated by a desire to suppress a particular point of view." *Id.; Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Such a conclusion rests on findings of *fact*. The District Court found none; the Court of Appeals adduces none.

The Seventh Circuit misconstrued the foundation of this ordinance: it is based on a harm theory, not a viewpoint theory. Materials not covered may embody the same viewpoint, but they do not do the same harm. What is sex discrimination under the Ordinance is apparently viewpoint discrimination to this Court of Appeals. The Ordinance only "discriminates" between materials that do this damage and materials that do not — or do less or other damage or do it less directly.

Only by its refusal to look at the actual material the Ordinance covers in light of applicable precedent, and by minimizing its record of atrocities, can the Court of Appeals hold that, as a matter of Constitutional law, Appellants are precluded from taking sides on the question of eroticized violence against women. Given that this Ordinance does not make mere views actionable, there is no law that government must remain neutral while its citizens

are abused. Whatever one's economic views, the "marketplace of ideas", *see Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), was intended as metaphor. The Constitution was as much written, and has been as often interpreted, to impower the vulnerable against the excesses of power of the powerful. *See, e.g., U.S. v. Darby*, 312 U.S. 100 (1941). Even in *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), in which a group libel statute was given no effect, the Seventh Circuit noted: "It bears noting that we are *not* viewing here *a law which prohibits action designed to imped the equal exercise of guranteed rights* . . .or even a conspiracy to harass or intimidate others and subject them thus to racial or religious hatred. *See Beauharnais v. Illinois*, 343 U.S. 250, 285 (1952) (Douglas, J., dissenting). If we were, we would have a very different case." *Collin v. Smith*, 578 F.2d at 1204 n.13 (emphasis added). The City seeks full review of such a case here.

* * *

The Court of Appeals turned a compelling state interest into a prohibited viewpoint, acts into ideas, concrete harms into thoughts, and this society's commitment to equality under law into a free market argument for social Darwinism. Yet Appellants found, and the appeals court specifically did not disturb, evidence of the unique relation of pornography to sex-based inequality. From the Court of Appeals' decision, it appears that the instant case is sex discrimination's analogue to *Dred Scott v. Sanford*, 60 U.S. 393 (1857). There, it was found more important to the U.S. Constitution to require Negroes to be slaves than it was to permit a legislature to recognize their full citizenship, including their right to sue. Here, the Court of Appeals has determined that women can be raped and battered and tortured, "bought and sold, and treated as an ordinary article of merchandisé and traffic, whenever a profit could be made by it," *id.* at 407 (Taney, J. for the Court), and the industry that concededly requires and profits from this predation is more important to the U.S. Constitution than they are. The City-County Council sought only to recognize

women as full citizens by permitting them to hold accountable those who relegate them to inferiority. It means nothing other than that women are still regarded as "beings of an inferior order," *id.* at 407, for a court to admit every step in this argument except the conclusion that something should be done about it.

II. There is no Article III "case or controversy" between the present parties.

Appellees are plaintiff organizations which represent legitimate publishers, distributors, and sellers of books, magazines, newspapers, and films, and one consumer. They allege that the enactment of the Ordinance means that "the rights and other legal relations to the [appellees] will be affected...." (Second Amended Complaint, ¶5) The Seventh Circuit, citing *Buckley v. Valeo*, 424 U.S. 1, 11-12 and n.10 (1976), held that because appellees "are directly affected by the ordinance," (App. A, A-7) they may sue the City that passed it. Neither this Court nor any appellate court has ever countenanced a pre-enforcement challenge to a state law in such an abstract and conjectural posture. Such a major lowering of this federal jurisdictional threshhold requires plenary review.

Article III courts exist to resolve "cases or controversies," not to issue advisory opinions. This Court therefore requires actual injury, so that "the legal questions presented...will be resolved, *not in the rarified atmosphere of a debating society*, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (emphasis added). Plaintiffs must allege a "personal stake" in the outcome, meaning they must have "suffered 'some threatened or actual injury resulting from the putatively illegal action....'" *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973)).

Warth is closely aligned to the instant case. Various organizations and individuals challenged a town zoning ordinance on First Amendment grounds. Although plaintiffs alleged that the town board had committed various illegal acts under the ordinance, none of those acts had ever been directed at plaintiffs. The ordinance was never applied to plaintiffs, nor had plaintiffs been denied building permits or variances under the ordinance. In as much as the individual plaintiffs in *Warth* failed to demonstrate how they personally had been injured, and the organizational plaintiffs failed to show that any of their members were suffering immediate or threatened injury, this Court declined to confer standing.

Babbitt v. United Farm Workers National Union, 442 U.S. 289 (1979), set forth the particulars that a plaintiff must allege in a pre-enforcement challenge to a statute. While acknowledging that a plaintiff need not wait until he has actually been prosecuted under a law before challenging it, the Court firmly provided as a minimum requirement that

> [a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement[,]

id. at 298,

> and plaintiff must allege an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder....

Id.

Recognizing the special value and sensitivity of First Amendment rights, the requirements of actual injury and personal stake are sometimes modified, including in advance adjudications. The doctrine of procedural overbreadth has been fashioned to permit a plaintiff to raise the interests of third parties who are not before the

court — parties whose speech will be stilled if the law is applied, such that a real context for examining its validity may never arise. *Broaderick v. Oklahoma*, 413 U.S. 601 (1973). However, Appellees did not raise the interests of others, only their own.[5]

More importantly, Appellees did not allege that they have suffered any actual or threatened injury or threat of prosecution as a result of the Ordinance. There was no factual nexus whatsoever between Appellees and Appellants, e.g., threats in written or verbal communications.

Appellees allege no intent to traffick in pornography, coerce anyone into performing for it or intent to assault someone because of it. Appellees allege no intent to produce, distribute or sell pornography which is the product of coercion or will be used in an assault. Appellees do not allege an intent to force pornography on any person, and they cannot claim injury by a third party's forcing complaint because it can only be filed against the perpetrator. Appellees do not even allege, contrary to the Seventh Circuit's statement, that they "make, sell or read just about every kind of material that could be affected by the ordinance." (App. A, A-7)

The one consumer plaintiff does not allege an interest in reading material produced by coercion or causing assault. To allege that one is a "reader and viewer of First Amendment-protected material" (Second Amended Complaint, ¶5) is to plead not a fact, but a conclusion of law. As support for standing, the allegation is circular with respect to the merits.[6]

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[5] In this regard, the Seventh Circuit did find that the special overbreadth standing rules do not apply to Appellees. (App. A, A-7)

[6] Alleged vagueness also cannot be used to bootstrap standing. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 497 n. 9 (1982). The Seventh Circuit did not find the ordinance vague. ("This statute . . . is all too clear." (App. A, A-8))

Appellees come neither under the usual rules of pre-enforcement standing, *Babbitt v. United Farm Workers National Union*, *supra*, nor under the relaxed First Amendment exceptions. *Broadrick v. Oklahoma*, *supra*. The Seventh Circuit, reading *Buckley v. Valeo*, 424 U.S. 1 (1976), to allow suit on the mere allegation of direct effect, reduced standing to a subjective hypothesis of future impact. *Buckley* is distinguishable. Congress, in the Federal Election Campaign Act of 1971, expressly provided for judicial review of constitutionality. *Id.* 424 U.S. at 11-12. This review extended to some of the plaintiffs, *see id.* 424 U.S. at 8 n.4, and appeared to weigh in the finding of standing. Further, "the complaint discloses that at least some of the appellants have a sufficient personal stake in...each challenged provision" to gain specific relief from a conclusive decree. *Id.* 424 U.S. at 12. Plaintiffs in *Buckley* indisputably would not have been able to give or receive certain campaign funds because of the Act. The case at bar, by contrast, requests "an opinion advising what the law would be upon a hypothetical state of facts." *Id.* 424 at 12.

An admittedly extraordinary line of cases have permitted suits in certain contexts by those whom a law, on its face, names, e.g., state employees, *Broaderick v. Oklahoma*, *supra*, prison inmates, *Procunier v. Martinez*, 416 U.S. 396 (1976), or teachers, *National Gay Task Force v. Oklahoma*, 729 F.2d 1270, *aff'd on equally divided vote*, 105 S.Ct. 1858 (1985). The instant ordinance does not single out any category of person for exclusive application; it instead makes actionable harms by anyone. Moreover, in the cases cited, the laws were criminal or disciplinary and prohibitory such that enforcement was nearly ministerial. Here, by distinction, Appellants have made certain practices civilly actionable so that private citizens may choose to bring complaints to it

The Seventh Circuit's ruling conflicts with clear law in other circuits. The Ninth Circuit holds that "the mere existence of a statute, which may or may not ever be applied

to plaintiffs, is not sufficient to create a case or controversy...." *Stoianoff v. State of Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983) (challenge to advertising prohibition). Because a plaintiff did show "that he was seriously interested in subjecting himself to...the challenged measure," that same court found a case or controversy in a challenge to a city council's procedural rule. *NAACP, Western Region v. City of Richmond*, 743 F.2d 1346, 1351 (9th Cir. 1984). The Fifth Circuit found a case or controversy because a plaintiff who challenged a ban on outdoor advertising alleged a desire to engage in it and had in fact lost expected revenue due to the law. *LaMar Outdoor Advertising v. Mississippi State Tax Commission*, 701 F.2d 314 (5th Cir. 1983).

The only injury Appellees claim besides being "affected" by the existence of the Ordinance is that the Ordinance is a "threat." (Second Amended Complaint, ¶11) These allegations amount to no more than a "chilling effect" on their First Amendment rights which alone has never been sufficient to establish standing for a moving party. In *Younger v. Harris*, 401 U.S. 37, 41-42 (1971), allegations that plaintiffs "felt inhibited" in the exercise of their First Amendment rights because of the existence of the California Criminal Syndicalism Act were found insufficient. In *Laird v. Tatum*, 408 U.S. 1 (1972), the Supreme Court denied standing when the existence of a government investigative activity was alleged to chill constitutional rights. Any chill was perceptual not factual. *See also United Public Workers of America v. Mitchell*, 330 U.S. 75 (1946).

The Courts of Appeals have followed suit. The Court of Appeals for the District of Columbia recently clarified that it is only in the area of First Amendment overbreadth challenges that "chilling effect" has anything to do with standing. In *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984), plaintiffs alleging a chilling effect on their First Amendment rights and an immediate threat of being targeted for surveillance under an

executive order regulating intelligence activities were found not to have alleged any specific action, threatened or contemplated. As the instant case presents a similar lack, the D.C. Circuit's criticism applies: "[c]hilling effect is cited as the *reason* why the governmental imposition is invalid rather than as the *harm* which entitled the plaintiff to challenge it." *Id.* at 1378 (emphasis supplied). *See also Lecci v. Cahn*, 493 F.2d 826 (2nd Cir. 1974).

Lacking an allegation of objective and personal actual or immediately threatened harm, this case excludes all those whose interests are truly at stake in it: pornographers, their customers, and their victims. This eight billion dollar per year industry shows no sign of disappearing — nor do its victims, who are eager, indeed desperate, to seek relief. Yet the bare assertion that someone's interests are "affected" has excluded those harmed, staying the law while hypothetical possibilities are debated, and has given foundation to threats of expensive lawsuits against localities *for merely passing a civil rights law*. This Court must examine an alteration in federal jurisdiction of such scope and consequence.

III. The Court of Appeals should have granted abstention.[7]

The courts below erred in failing to abstain from adjudicating the merits of the Ordinance prior to authoritative construction by the Indiana courts. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) and its progeny counsel federal restraint in deciding constitutional challenges to local enactments susceptible to state judicial construction that would avoid or modify the need to reach the federal constitutional issues. *Id.*; *e.g.*, *Hawaii Housing Authority v. Midkiff*, 104 S.Ct. 2321 (1984).

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[7] Appellants *did* urge abstention at oral argument before the Seventh Circuit.

The Ordinance presents novel and unsettled questions of state law, the threshhold of *Pullman* abstention. Neither the definition, the causes of action, nor the procedures have ever been construed. The present action was begun before the law could go into effect, a consideration that has favored abstention. *Bellotti v. Baird*, 428 U.S. 132 (1976). No existing law suggests, far less compels, the full interpretation the Indiana Supreme Court would give it. *Compare Kusper v. Pontikes*, 414 U.S. 51 (1973), *with Bellotti*, 428 U.S. at 147-148. As the present litigation suggests, the meaning of the Ordinance's key provisions can not be regarded as settled as a matter of state law.

A state construction could eliminate or modify the federal constitutional questions. The Seventh Circuit denied abstention because "it is the structure of the statute rather than the meaning of any of its terms that leads to the constitutional problem." (App. A, A-9) "Structure" apparently means that all the causes of action field the definition. The definition was considered viewpoint discrimination. But the *meaning of the terms* were the only source mentioned for this problem. Interpretation could have eliminated this difficulty, such that the "structure" of the ordinance would be no problem. Instead, the Seventh Circuit utterly disregarded the local interests in reducing sex discrimination which motivated the enactment.

Concerns for potential First Amendment interests should not defeat abstention either. The district court's injunction need not be dissolved pending the ultimate resolution of the issues in state court under a stay.

CONCLUSION

For all of the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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